United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-4248

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM GELLER and DORIS GELLER,
Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee

ON APPEAL FROM A DECISION OF THE
UNITED STATES TAX COURT

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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POINT I
THIS IS NOT A SPECIFIC ITEMS CASE; THE FINDING OF OWNERSHIP WAS BASED ON CIRCUMSTANTIAL EVIDENCE, WHICH WAS TAINTED BY A FAILURE TO INVESTIGATE LEADS

On this appeal, the Commissioner has switched from treating this case as a circumstantial "bank deposits" case to a direct "specific items" case. In petitioners' opinion, he has done this to avoid the need to investigate leads as to the true ownership or source of the brokerage account deposits and also to shore up a case that the Tax Court found unconvincing unless favored with a "presumption of correctness"-- a presumption that, despite his assertion of ambiguity in the case law, the Commissioner was not entitled to once the limitations period had run.

At the outset, taxpayers object tothe introduction of a new theory after both the Notice of Deficiency served upon them four years ago and the decision of the Tax Court were based expressly upon the bank deposits theory.

In that Notice, under the heading "Explanation of Adjustments," the Commissioner explained: "It is determined that you realized unreported taxable income in the amount of $203,612.78 for the taxable year 1965 and $24,151.25 for the taxable year 1966 representing unexplained deposits in the brokerage account of Wolf Geller with Merrill, Lynch, Pierce, Fenner & Smith,Inc. of which were not verified or explained." (Emphasis supplied.) (A.3; incor-

porated by reference at A.4)

Thereafter the Judge of the Tax Court defended the Commissioner against taxpayers' contention that the basis of the proceeding against them was not made sufficiently clear: "[Commissioner's] subsequent declaration of a potential source of the funds deposited does not alter the fact that petitioner was informed of the basis for the determination, namely the unexplained deposits, far in advance of the time of the trial." (A. 30)(Emphasis supplied.) The Judge further stated his perception of the theory of the case: "In view of the absence of books and the inadequacy of petitioner's explanation of the deposits, [the Commissioner] was fully justified in resorting to the bank deposits method of reconstructing income."(A.25)

Anticipating a reaction, the Commissioner, in a footnote in his brief at p.17, cites U.S. v. Lacob, 416 F.2d 756,760(7th Cir., 1969) as permitting the variance.

In Lacob, however, the Government furnished taxpayer with a Bill of Particulars in which "the items listed were clearly stated to be a 'partial' list of payments made by 'some'" sources of taxable income, and the Court approved the expansion of the theory-- which was done at the trial level, not the appellate level-- because the Government "has in no sense renounced" the other theories. Id, at 759. In this case the sufficiency of the Commissioner's notice to petitioners hinged upon the relia-

bility of his announced theory.

While the need for a new theory is palpable[1/], calling this a "specific items" case begs the question. The question is not whether the $15,000 or $228,000 in the brokerage account derived from the corporation's assets; there is no answer to that question which would impose tax liability upon petitioners. The question is whether the $15,000 or $228,000 was the property of petitioners or of others. The Commissioner says (Br. 19) that he did not know who owned the corporation's assets until he came upon the "Wolf Geller" brokerage account.[2/] Yet it was precisely the ownership of that account that should have been investigated--as the Commissioner's Special Agent started to do. The Commissioner may not resolve his doubts with evidence that is itself doubtful in the same respect, particularly when the Commissioner failed to make an effort to resolve those subsequent doubts. Whether this contrived process is an instance of "piling inference upon

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1. First, there are transparent limitations to relying upon the bank deposits theory as the framework for the Commissioner's "clear and convincing" proof when the Commissioner has traced only $15,000 of $228,000 in bank deposits, and then to a brokerage account which bears the address of someone other than taxpayer, which other individual was mailed up to half the bonds and either picked up or was given the remainder. Second, if this is a bank deposits case, the Commissioner's failure to investigate the lead to the apparent owner of the deposits would probably dispose of this appeal in favor of petitioner-taxpayers.

2. "The inquiry was an effort to determine who had received these amounts [from the corporation] and whether it had been reported as income by the recipient."(Br. 19) To this day,however, the Commissioner does not know whether Morris Geller (or someone else whom an investigation of Morris Geller might have led to) did in fact report these amounts as income, despite the Special Agent's suspicions as to Morris Geller. Regardless of what the investigation might have turned up, the Commissioner should not be heard to say that he made the "effort" reported in the excerpt when he cannot even say that the income in issue has in fact gone unreported.

inference"or of simply linking together strands of circumstantial evidence each of which has the same fatal flaw as the next, the Commissioner has no right to claim that the investigation of leads in this case was obviated because he can allegedly account for the immediate physical origin of the funds in the brokerage account.[3]

As the Judge of the Tax Court and Commissioner's trial counsel perceived, the only hope of connecting petitioners to the funds in the brokerage account was by circumstantial, not direct,evidence. Even so, the evidence failed to convince the Judge of the Tax Court without the backing of a presumption wrongfully bestowed upon the Commissioner's determination. Since the effect of that presumption was to avoid the consequences of the Commissioner's failure of proof and failure to investigate leads, a finding that the presumption was wrong as a matter of law indicates the need for a reversal of the Tax Court decision.[4]

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3. In this regard, this Court is requested to note not merely that neither strand of evidence is convincing proof of ownership of the assets (the Commissioner appears to concede as much) but that even as weak affirmative evidence each is contradicted by various considerations: petitioners' relationship to the corporation was so open and nonfraudulent that he filed accurate tax returns for 15 years, during much of which period he was under intensive investigation by the Commissioner, and the Wolf Geller account was not carried under a misleading name and was listed in the address of another who was mailed a substantial number of bonds.

4. U.S. v. Suskin, 450 F.2d 596 (2nd Cir.,1971), the Commissioner's only citation on this point, illustrates that "leads" need not be followed when both the source of the money the taxability of which is in issue and the ownership of the money are either established or conceded. (The issue in Suskin was the Commissioner's introduction of hearsay evidence under the banner of "leads" in order to rebut Suskin's alleged offsets from income that he concededly received.) See also Swallow v. U.S., 307 F.2d 81(10th Cir.,1962) for the proposition that leads are not investigated in a "specific item" case because the reasons for investigation are not present; and that a clear showing of both the origin and beneficial ownership of the money in issue (in Swallow the money was put to taxpayer's personal use) is a prerequisite of applying the "specific items" theory

Finally, petitioners regard as inverted the Commissioner's reasoning that if he can link the $15,000 in corporate assets directly to petitioners (by checks transferred over petitioner's name from one depository to another) he need not prove clearly and convincingly that the remaining $213,000 belonged to petitioners. An opposite syllogism to one that has the tail wagging the dog makes considerably more sense: If the Commissioner acknowledges that his position as to who owned $213,000 in bonds may be vulnerable, petitioners' assertion that they did not own the remaining $15,000 surely was not refuted by clear and convincing evidence as a result of a showing that the $15,000 was shunted to the account through which that $213,000 also passed. Even the Commissioner does not contend that the "leads" doctrine is inapplicable to the $213,000 for which checks were not produced (except on the ground considered in the next Point herein); and had the Commissioner investigated the $213,000 in a manner sufficient to satisfy his legal obligation under Holland v. U.S., 348 U.S. 121(1954), he and the Tax Court probably would have learned who owned the incidental $15,000 as well.

POINT II
THE COMMISSIONER IS EXTREMELY MISTAKEN IN HIS READING OF TWO UNITED STATES SUPREME COURT CASES

In the context of challenging petitioners' assertion that the Commissioner must investigate reasonable leads, the Commissioner asserts that once he shows a "likely source" of bank deposits he is released from the obligation to investigate "all reasonably possible non-income sources." (Br. 25)

The position, based on a blatant misreading of Holland v. U.S., supra, and U.S. v Massei, 355 U.S. 595(1958), is in error: The Commissioner may never satisfy both prongs of the Holland standard by showing a likely source.

Massei simply holds the obvious, that "should all possible sources of nontaxable income be negatived, there would be no necessity for proof of a likely source." 355 U.S. at 595. Under Holland proof of a likely source and (not "or") the negativing of all reasonable possibilities is required. If the Commissioner goes beyond investigating leads and negatives all possible nontaxable sources, he then may dispense with proof of a likely source. However, proof of a likely source standing alone will not satisfy either Holland or Massei.

In the instant case the Commissioner did not even investigate sustantial leads to the source of ownership of the bonds, much less negative all possible nontaxable sources.

POINT III
IF TIMELY COMMENCED, THE COMMISSIONER ENJOYS A PRESUMPTION OF CORRECTNESS AS TO PART OF A FRAUD CASE; IF NOT, HE MUST PROVE EVERY ELEMENT OF THE CASE CLEARLY AND CONVINCINGLY

The Commissioner defends the use by the Tax Court of a presumption that the Commissioner's assessment was correct. The presumption, found to be insufficiently rebutted, accounted for the finding of the Tax Court that the $228,000 in bonds was the property of petitioners and derived from the likely source

of the corporation's assets, rendering the $228,000 income taxable to petitioners.

The cases cited in petitioner-taxpayers' brief at pp. 8-11 make clear that when the Commissioner must prove fraud to establish any tax liability at all(as when the statute of limitations has run) he may not rely on the usual "presumption of correctness" to prove any part of his case. In rebuttal the Commissioner cites cases in which the Commissioner's assessment came within the limitations period, and in which the Commissioner therefore did not have the burden of proving fraud as to the basic issue of whether or not the assessment represented taxable income. Petitioners have never contended the contrary. But neither has it ever been contended prior to this hard case that the Commissioner may avail himself of the presumption of correctness after he has waited out the limitations period and made petitioners' defense stale.

Petitioners will grant that had the notice of deficiency been served upon them within the three-year statutory period (which would have enabled them to prepare a defense with the assistance of witnesses who were yet alive) the Commissioner might have had his presumption of taxable income, and could then have attempted to prove fraud by evidence independent of and superimposed upon any finding of taxable income that would have survived petitioners' rebuttal. On the facts of the case, however, petitioners repeat what must be well known to the Commissioner, that an altogether erroneous standard was applied to the most crucial element of this case.

POINT IV

TO ESTABLISH OWNERSHIP IN THE ABSENCE OF A PRESUMPTION THE COMMISSIONER MUST PROVE THAT TAXPAYERS TREATED THE BONDS AS THEIR PROPERTY; THE "APPARENT INCOME" RULE IS NOT EFFECTIVE TO PROVE OWNERSHIP

Even as to the supposedly solid part of his case (the $15,000 out of the $228,000 in issue) the Commissioner's claim is that his "having proved unexplained receipts having the appearance of income in the amount of at least $15,000, it then became the taxpayer's burden to attempt to satisfy the court that it should not be so treated." (Br.18) As to the remaining $213,000, the Commissioner concedes that "the balance of the asserted deficiencies are possibly not so sharply in focus ...." (Br. 18-19)

The Commissioner further maintains that "the taxpayer's suggestion that the bearer bonds went to his brother, Morris... is totally irrelevant, even if true."(Br. 25)

In this Point petitioners will show that "apparent income" means something other than the Commissioner suggests; that whenever the Commissioner has had to prove the taxable receipt of income by a taxpayer he has had to produce--and has produced-- incomparably more and better evidence than he has here; and that the contention that even if the $228,000 wound up with Morris the Commissioner may tax his brother William is astounding.

The "apparent income" cases cited by the Commissioner (Br. 17) are excellent examples of what the rule means. In U.S. v. Lacob, supra, taxpayer, an attorney, did not challenge the assertion that the receipts alleged were income to him; he did claim

offsetting deductions in excess of those he had reported originally and further claimed that some of the income represented a return of expenses he had laid out for clients. The rule applied was that allowable deductions from the undisputed income of taxpayer must be proved by the taxpayer. Again, in Siravo v. U.S., 377 F. 2d 469 (1st Cir.,1967) taxpayer was instructed that he had the burden to sustain his contention that unreported labor costs and costs of goods sold rendered apparently taxable income nontaxable.

The "apparent income" rule was nowhere better stated than in U.S. v. Stayback,212 F.2d 313,317 (3rd Cir.,1954):

> "It is well settled that once the government establishes unreported income of the defendant and allows deductions claimed by him in his tax return and others that it can calculate without his assistance, the burden is on the defendant to prove that he had other allowable deductions which were not shown in his return: [Citations omitted.] The government is not required to prove the negative,i.e. that the defendant did not have any other deductions. [Citation omitted.]
>
> "The figures of cost of goods sold, as they were used in preparing his tax returns, were at least admissions by the defendant which the government could utilize in making a prima facie case. The defendant was chargeable with them until he offered credible evidence to show that the figures were in error, and that his costs were greater...."

See also U.S. v. Nemetz,309 F.Supp. 1336 (W.D.Pa.,1970), for the appropriate context of an application of the "apparent income" rule.

In the instant case, the Commissioner asks this Court

to permit him to make the taxpayer prove (after the limitations period) that bonds in a brokerage account carried under taxpayer's name are not income to taxpayer, even under circumstances in which the Commissioner neglected to follow the obvious lead to the apparent owner of the bonds. It should suffice to note, and to establish by cases above and below cited, that in the absence of a presumption of correctness attaching to the Commissioner's determination the taxpayer has no "burden of going forward" until the Commissioner has proved his case clearly and convincingly without the aid of inferences from taxpayer's "failure to rebut"; and also that under circumstances analogous to the one at bar, the cases have never permitted the Commissioner to cry "apparent income" and shift the burden of proof.

The Tax Court cases of Russel C. Mauch and Patrick H. Smith have been analyzed in petitioners' main brief at pp.7-8,13; the Commissioner was held to have the burden of proving that what "apparently" was income was actually retained for the benefit of the taxpayer. In this case the Commissioner did not attempt to prove conversion of the bonds, nor could he even show that petitioner's living expenses raised a question of spending beyond reported means.

Other cases that illustrate the nature and extent of the Commissioner's burden, as it has been universally viewed prior to the decision of the Tax Court in this case, are Swallow v. U.S., supra, 307 F.2d at 82; and United Mercantile Agencies,Inc.,

23 T.C. 1105,1107-10(1955), aff'd sub.nom. Drybrough v. C.I.R., 238 F.2d 735 (6th Cir.,1956).

Although not acknowledging that he had the burden of proof, the Commissioner maintains in his brief, at p. 23, that the "body of evidence [herein] is as strong as that appearing in cases such as Halle v. Commissioner [175 F.2d 500(2nd Cir.,1949), cert. den. 338 U.S. 949(1950)] and Goe v. Commissioner [198 F.2d 851(3rd Cir.,1952)] ..."

In Halle, the Commissioner served his notice within the limitations period, and this Court sustained the Tax Court's finding of deficiency not on the basis that the Commissioner sustained any burden as to income, but on the basis of the unrebutted presumption of correctness that correctly attached to the Commissioner's timely determination. Also distinguishing that case was that the Commissioner had no leads to follow that might have exonerated taxpayer, but nevertheless "[n]o reasonable doubts were resolved against the taxpayer...." 175 F.2d 501-502.

In Goe, the taxpayer claimed that bank deposits made in installments over a nine year period to a checking account represented $80,000 of savings from salary over a period of years. The fact that the deposits were to a checking account and the refusal of the taxpayer to explain why the deposits were made in installments over nine years weighed heavily against his contention that the $80,000 was not current income. Had the Commissioner shown nothing further, the evidence in Goe would have outweighed the evidence in this case. But petitioners herein note

with a chagrin that is intensified by the Commissioner's bold citation to Goe that still other evidence of an overwhelming qualitative nature was produced in Goe. The Commissioner showed that during the period in which the taxpayer said he was sitting on large amounts of money without earning interest thereon, he had inexplicably borrowed $32,000 and paid interest on his borrowings. Still more, "the Commissioner and the Tax Court also found evidence of liberal spending by taxpayer not easily reconciled with his story of extreme frugality enabling large salary savings." 198 F.2d at 853. "In these circumstances," said the Court of the post-limitations period assessment, "we think the finding and assessment of a deficiency was reasonable and must be sustained." Ibid.

In the circumstances of the instant case, the Commissioner mounted one faulty conclusion upon another, ignored leads, failed to offer a single contradiction to petitioners' account of their relationship to the corporation and to the bonds, and could not rebut a single one of the many contradictions that petitioners offered to the Commissioner's account. He now belatedly contradicts himself and the Tax Court Judge by changing the theory of his case and further submits that even if his proof is "not so sharply in focus" as to $213,000 of the $228,000 deficiency alleged, taxpayers should be assessed $175,000 in taxes because of $15,000 in "apparent income" that they never were shown, directly or indirectly, to have had the benefit of.

Goe plainly stands for the principle that the Courts require far more of the Commissioner when he has the burden of proof than the creation of suspicious circumstances for the taxpayer to explain away.

Finally on the issue of what must be proved, and in view of the Commissioner's citation to U.S. v. Suskin, supra, petitioners refer this Court to the Government's answering brief to this Court in the Suskin case: "[I]n a criminal case, the burden, of course, is on the Government to prove all the elements of the crime alleged beyond a reasonable doubt. More particularly, in the present case, the jury was clearly instructed that the Government was required to prove beyond a reasonable doubt that the appellant in fact 'pocketed' substantially all the money he received from Jerry Kassel, Inc., in 1961." U.S. v. Suskin, Docket 35443,1971, Appellee's Brief, p.18.

Applied to this case, the Commissioner, by long-established standards, was required to prove "clearly and convincingly" (the standard in a civil fraud case) that petitioners in fact "pocketed" the funds in question. Petitioners submit that nothing resembling this burden was met, as the Tax Court Judge doubtless understood when he felt compelled to apply, albeit mistakenly, a presumption of correctness to the Commissioner's findings.

In a separate justification of the limited proof and failure to investigate the one lead that was significant, the Commissioner maintains (Br.25-27) that since petitioners were shown to "control" the brokerage account, petitioners were obligated to "show that what clearly appeared to be so was in fact

not so." According to this approach, the Commissioner regards as "a matter of at best secondary significance" whether the ultimate destination of the bonds was the coffers of Morris Geller. Indeed, says the Commissioner, Morris' receipt of the bonds "is totally irrelevant, even if true."

Petitioners request this Court to consider whether petitioners, whose standard of living has always been exceptionally modest, would have given $228,000 of their "income" to Morris as a gift. Far from being a secondary matter, the determination of this appeal should rest on this very question.

Contributing to the Commissioner's remarkable lack of perspective in analyzing the pertinence of the role played by Morris Geller is his definition of income. Like the various presumptions and theories discussed above, there is no precedent for the Commissioner's definition in this case. Petitioners "controlled" the brokerage account insofar as one of them opened it in his name, deposited into it $15,000 in corporate funds, made other deposits into it from sources unknown (neither the testimony nor the evidence linked him to all the deposits), and picked up, together with another person, bonds on at least six occasions out of twelve. Contrary to the Commissioner's facile definition, "control" of this nature does not constitute a prima facie demonstration of income, and certainly does not make out a clear and convincing case.

The test of income has always been whether the taxpayer received the particular assets under a claim of right as against the world and without material restriction. Petitioners have never asserted a right to the bonds vis à vis the true owner of the bonds. They never acted in any manner that was consistent with such a claim or inconsistent with their assertion that they were a conduit. By entering that owner's address on the brokerage account, at least one substantial restriction on their possession of the bonds was openly recorded. Not even the fleeting possession that was shown of half the bonds was shown of the other half, nor was the disposition of any of the bonds. How then does the Commissioner suppose that he met the burden of supporting his late claim that petitioners received "income"?

Furthermore, accepting arguendo the Commissioner's "control" test, it still would not be possible to find that petitioners committed fraud with the intent of evading taxes by virtue of funds that--according to the Commissioner's definition-- were technically "income" to them, when the funds would not have been considered their own by petitioners and were promptly transferred to another. This consideration alone makes incomprehensible the Commissioner's reference to Morris' role as "totally irrelevant" and "of at best secondary significance."

In sum, the Commissioner's heavy reliance on appearances infected his entire case. Without the presumption of correctness wrongly awarded him at the outset, it would be plain enough that he did not arguably sustain his burden of proof. Even with his erroneous presumption, however, his failure to follow the only significant lead would independently require reversal of the decision below.

POINT V

EVASIVENESS OR INADEQUATE RECORDKEEPING IS EVIDENCE OF FRAUD ONCE THE EXISTENCE OF TAXABLE INCOME IS PROVED; NEITHER, HOWEVER, MAY BE USED TO PROVE THE EXISTENCE OF TAXABLE INCOME

In addition to the responses contained in their main brief, petitioners deny any implication by the Commissioner (it is not clear to petitioners whether those implications were intended) that the question of whether or not the funds in the brokerage account constituted income to petitioners may depend to any extent upon a showing of "fraud" or "concealment" or "inadequate recordkeeping."

The issue of the existence of taxable income and the issue of whether fraud should remove the statute of limitations and yield an additional penalty are separate. Intertwining them will produce confusion prejudicial to petitioners, and petitioners therefore stress that while a finding of income may lead to a finding of fraud in the filing of the return, the reverse has never been true. In the cases cited by Commissioner, the deficiency itself was always established by proof independent of fraud by taxpayer.

Furthermore, the Commissioner's references to everything from the statements in the Petition in 1973 to petitioners' post-trial memorandum in 1976 should be completely disregarded. Not only do the statements bear no logical connection with the question of whether the funds in the brokerage account were income to petitioners, but evidence of post-litigation responses by taxpayer cannot serve even the customary uses of evidence of conceal-

ment or evasiveness, for such statements have no probative force in showing fraud in the filing of the return. Instead, their use by the Commissioner appears to be designed to distract from the issues which form the basis of this appeal.

Of petitioner's failure to produce pertinent books and records, a similar point should be made. If a taxpayer does not keep sufficient records, the Commissioner may make indirect computations; it may also be some evidence of concealment once the existence of taxable income is established. In the instant case, the failure of petitioners to keep signed receipts for the bonds is consistent with their account of the transaction and relationships involved. Moreover, those receipts, while of undisputed value to petitioners now that Morris Geller is dead and the Commissioner has waited until after the limitations period to bring his action, are neither "ordinary" records nor records that petitioners were required by law or regulation to maintain. In fact, the corporation's tax filings, prepared by petitioners and the corporation's accountant (as the accountant testified, he was also Morris Geller's accountant), have not been challenged. The issue of recordkeeping should therefore either be excluded from this proceeding or, at most, consigned a role far less central than the Commissioner suggests.

POINT VI

THE COMMISSIONER HAS SHOWN NO BASIS FOR REMAND; THE DECISION OF THE TAX COURT SHOULD BE REVERSED AND DECISION DIRECTED IN FAVOR OF PETITIONERS

In the conclusion of his brief, the Commissioner asks this Court to remand the case for the further taking of evidence if error is found.

Petitioners pray this Court to direct decision in their favor. The Commissioner has had a decade in which to investigate the case and marshal evidence. He has not stated on what theory he may ask for another go at petitioners, whose age and health would make further proceedings against them unusually oppressive.

With regard to the standard of review, the rule is that when this Court finds that a lower court has applied the wrong standard in making its findings, this Court will not affirm through the process of applying the correct standard and substituting its judgment for that of the lower court. If, however, this Court determines that, substituting and applying the correct standard to the record as it exists (and not as it may be developed upon a remand), the finding of the lower court is not supportable, the Court will reverse. See Kreps v. C.I.R., 351 F.2d 1,7(2nd Cir.,1965).

Petitioners request a reversal both on the basis of the weight of the evidence, which would have rendered clearly erroneous a non-presumptive finding that taxable income and fraud

were proved clearly and convincingly, and on the basis of the Commissioner's arbitrary failure to investigate leads that, had they been pursued, would have exculpated petitioners.

CONCLUSION

For the foregoing reasons, and for the reasons stated in petitioners' main brief, the decision of the Tax Court should be reversed with directionto enter decision in favor of petitioners.

Respectfully submitted,

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Petitioners-Appellants

March, 1977
New York, New York

CERTIFICATE OF SERVICE

The undersigned, an attorney admitted to practice before the United States Court of Appeals for the Second Circuit, does hereby affirm under the penalties of perjury that on the 15th day of March, 1977 he mailed 2 copies of the within brief of petitioners-appellants by first-class mail to the attorney for the reapondent-appellee, as follows:

Myron C. Baum
Acting Assistant Attorney General
Tax Division
United States Department of Justice
Washington, D.C. 20530

Irwin Geller
Irwin Geller

New York, New York
March 15, 1977